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6 Moore's Federal Practice (2d Ed.), p. 1818 11

IN THE

Supreme Court of the United States

October Term, 1956

No. 5

LAURENCE MASSA,

Petitioner,

vs.

JIFFY PRODUCTS CO., INC.,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Jiffy Products Co., Inc., respondent, respectfully opposes the grant of the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit filed by Laurence Massa.

Opinions Below.

The opinion of the Court of Appeals is set forth in the Petition (Pet. App. B, pp. 9-16 and is to be found in the Official Reports at 240 F. 2d 702, 112 U. S. P. Q. 241).

The Questions Presented.

The petitioner sets forth three questions on page 2 of its petition which questions it contends are entitled to this court's attention.

Question 1 could be more fully stated as follows:

1. Does a United States District Court have the power to render a default judgment declaring

a patent invalid and ordering the Commissioner of Patents to cancel the registration of a trademark in a case in which the defaulting party has appeared in the case, has answered, his pleadings have been stricken, and the well pleaded averments in the pleadings of the prevailing party, if taken as true, support the judgment, no evidence having been submitted to support the judgment?

Question 2 set forth by the petitioner is not presented by the case in respondent's opinion. The judgment below did not award a trademark registration to respondent in the absence of an application for registration to the Commissioner of Patents. The filing of such an application was made a condition precedent.

Question 3, it is believed, could be restated as follows:

3. Does a United States District Court have the power under 15 U. S. C. A. 1119 to order the Commissioner of Patents to cancel a trademark registration in the absence of an interfering registered trademark.

Statement of the Case.

Petitioner has stated in his petition at page 3 that

"For the purposes of this petition we accept the facts as stated in its opinion (Appendix B, pp. 9-11) by the Court of Appeals."

Respondent also accepts the statement of facts as found in the opinion of the Court of Appeals.

The decision of the Court of Appeals is found at R. 108-114.

Respondent's Position.

It is the position of the respondent that:

1. The District Court acted within the scope of its authority and power in declaring the Massa patent 2,319,464 invalid and not infringed.

2. The United States District Court acted within the scope of its authority and power in decreeing that the Commissioner of Patents cancel the registration of the trademark "Jiffy" held by petitioner Massa.

3. In a default judgment all well pleaded averments in the complaint are taken as true, and it rests in the discretion of the trial court whether or not it should, under the provisions of Rule 55(b) Federal Rules Civil Procedure, require additional evidence to support its judgment.

4. The judgment of the District Court did not award the registration of the trademark "Jiffy" to respondent. Instead the judgment did two things:

(a) The Commissioner of Patents was ordered to cancel the registration; and

(b) It held that as between petitioner and respondent, the latter was entitled to a registration of the mark upon making application therefor to the Commissioner of Patents and upon complying with the requirements of the Patent Office.

Both (a) and (b) were conditioned upon a certified copy of the judgment first being filed with the Commissioner of Patents.

5. Section 1119 of 15 U. S. C. A. clearly gives to the District Court the power to order the Commissioner of Patents to cancel a trademark registration in the absence of an interfering registration.

6. The petition fails to present any special or important reasons justifying the consideration of this court.

ARGUMENT.

POINT 1.

The District Court Acted Within Its Power in Declaring the Massa Patent Invalid in a Default Judgment.

Respondent's cross-complaint [R. 44-65] sought declaratory relief with respect to its alleged infringement of the Massa patent 2,319,464, and at paragraph VII [R. 46-50] set forth grounds which, if true, rendered the patent invalid.

The petitioner Massa answered the cross-complaint but subsequently his pleadings were stricken. The respondent then moved the District Court for a default judgment, and after a hearing the motion was granted, as recited in the judgment. [R. 99.] The judgment held the Massa patent to be invalid and not infringed. At the hearing upon the motion for the default judgment no evidence was offered to support the allegations of the cross-complaint which then stood unanswered.

Rule 55(b)(2) of the Federal Rules of Civil Procedure (App. p. 1) states that the court "may conduct such hearings or order such references as it deems necessary and proper" in order to "establish the truth of any averment by evidence". The rule places no positive requirement upon the court to conduct hearings but instead places the matter within its discretion. The District Court did not deem it necessary to take testimony to support the uncontested averments of the cross-complaint, no damages were to be awarded and no accounting was necessary. Petitioner made no motion to set aside the default and took no steps to have the default judgment vacated.

It is respondent's position that if the well pleaded averments of the cross-complaint be taken as true by virtue of the default on the part of the petitioner then no evidence was required further to establish that truth. The District Court so viewed the matter and the Court of Appeals concurred saying: "This being a default judgment the allegations of the cross-complaint are taken as true." [R. 111.]

The right of a court to enter a judgment on default and find for the plaintiff without resorting to external evidence where the question is certain has been long established. In *Renner and Bussard v. Marshall,* 1 Wheat. 215, 4 L. Ed. 74 (1816), Justice Story said:

> "The last question is, whether judgment could be entered up for the plaintiff for the amount of his damages by the court, without a writ of inquiry. This, also, is completely settled by authority in all cases where the action is brought for a sum certain, or which may be made certain by computation."

In *Pope v. United States,* decided November 6, 1944, 323 U. S. 1, 65 S. Ct. 16, this court said:

> ". . . It is a familiar practice and an exercise of judicial power for a court upon default, by taking evidence when necessary or by computation from facts of record, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment accordingly. *Renner & Bussard v. Marshall,* 1 Wheat. 215, 4 L. Ed. 74; *City of Aurora v. West,* 7 Wall. 82, 104, 19 L. Ed. 42; *Clements v. Berry, Supra; cf. Mayhew v. Thatcher,* 6 Wheat. 129, 5 L. Ed. 223."

In *Last Chance Mining Co., et al. v. Tyler Mining Company,* 157 U. S. 683, 15 S. Ct. 733, 39 L. Ed. 859, this court stated:

> "It is said that the defendant did not contest; that they withdrew their answer, and that there was only a judgment by default. But a judgment by default is just as conclusive as an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest.
>
> "The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is, has there been such determination, and not upon what evidence or by what means was it reached. A failure to answer is taken as an admission of the truth of the facts stated in the complaint, and the court may properly base its determination on such admission. Suppose the defendant files a denial, and on the trial the only evidence is the testimony of a witness to an admission made by the defendant out of court, and upon such testimony the judgment is rendered. Is it any less a judicial determination because resting simply upon proof of the defendant's admission, and yet in principle what distinguishes that case from this?"

There is no burden upon the party taking a default judgment to present evidence and this fact was clearly held in *United States v. Borchers* (C. C. A. 2d, 1949), 163 F. 2d 347, cert. den., 68 S. Ct. 108, 332 U. S. 811, 92 L. Ed. 389. In that case Judge August N. Hand said:

> "Moreover, as we understand the language of Rule 55(b)(2), it does not appear that testimony had to be presented to obtain a judgment by default. The opinion of the Supreme Court in *Baumgartner v. United States,* 322 U. S. 655, 64 S. C. 1240, 1243,

> 88 L. Ed. 1525, holding that 'proof to bring about a loss of citizenship must be clear and unequivocal' was not uttered in relation to default judgments. As to such judgments the default of defendants who have been personally served may well take the place of the 'clear and unequivocal' evidence required had the case gone to trial."

Barron & Holtzoff, Federal Practice & Procedures, Volume 3, page 50, says in connection with defaults:

> "The allegations of the complaint except as to the amount of damages, are taken as true." (Citing *Northwestern Yeast Co. v. Broutin* (C. C. A. 6th, 1943), 133 F. 2d 628.)

The petitioner contends that when a patent is involved the rule should be changed. It is his contention (Point 1 of Pet. p. 6) that as a patent is presumed valid there is a burden of proof resting upon the party contesting that presumption which makes it improper for the court to hold the patent invalid in the default judgment upon the basis of the accepted truth of each well pleaded averment in the complaint asserting that invalidity. Petitioner does not deny that in the ordinary civil case the general rule may be satisfactory but he thinks that in a patent case greater proof should be required. He contends that patent cases are like citizenship cases in which a person may be deprived of his citizenship and refers to *Klapprott v. United States,* 335 U. S. 601, 336 U. S. 942, 69 S. Ct. 384, in the latter connection. His position is unsound.

First, the cross-complaint clearly alleges facts, which if true, make the Massa patent invalid. Paragraph VII of the cross-complaint [R. 46, *et seq.*] alleges that Letters

Patent 2,319,464 is invalid and void upon the following grounds:

(a) That the alleged inventions or discoveries claimed in the Letters Patent 2,319.464 were unpatentable to the inventor named therein, under the provisions of Sections 101, 102, and 103 of Title 35 United States Code . . .

(b) That the supposed invention was patented and disclosed in certain prior patents which are listed.

(c) That no invention was required to make the alleged invention.

(d) That prior to the supposed invention the subject was public knowledge and had been publicly disclosed in certain instances which were specified.

(e) That someone other than Laurence Massa made the alleged invention.

(f) That the patent was improperly granted by the Commissioner of Patents.

(g) That all of the claims of the patent defined an old combination.

(h) That the patent is so limited as not to be entitled to be viewed as infringed.

The judgment of the District Court [R. 99] found Letters Patent 2,319,464 invalid and not infringed. The petitioner has not contested the holding of non-infringement but only the holding of invalidity. It follows that if this court should believe the lower court erred in holding the patent invalid the judgment would still stand as to non-infringement.

Petitioner largely bases his position upon the *Klapprott* decision, *supra*, relating, as stated, to the question of re-

voking a man's citizenship. Petitioner contends that to hold a patent invalid is comparable to revoking citizenship and in so contending loses sight of the great differences that are present. The trial to determine whether or not a man should be deprived of his citizenship is quasi-criminal in character and can produce results which will be felt every day throughout the remainder of that man's life. The decision in such a case becomes the law of that man's life and may well be the most important single factor in his life. On the other hand, a patent may be declared invalid one day and the very next day in the same court the patentee can assert the same patent against a different defendant with potentially a different final outcome upon the presentation of different evidence. The decision in the patent case becomes only the law of that particular case. The differences between citizenship cases and the patent cases are very great.

As to the cancellation of a trademark registration, such a cancellation actually does not even change the ownership of the mark itself. The ownership is a common law right. The registration is only evidence. To say that a proceeding to cancel a trademark registration is comparable to a denaturalization proceeding is unrealistic.

Additionally, as respondent understands the law of the *Klapprott* case, it does not support petitioner's position. To be sure quotations from the opinion do support his position, but the actual law of the case does not.

The *Klapprott* case related to the denaturalization of a defendant who was in prison, held by the Government at the time he defaulted and failed to answer. The lower court entered a default judgment in the absence of evidence supporting the charges set forth in the complaint.

The defendant appealed and the decision was affirmed. Thereafter appeal was taken to the Supreme Court.

It was a hard case. To take away a man's United States citizenship was akin to convicting him of a crime. This court did not like the situation and in the majority opinion written by Justice Black, Justices Douglas, Murphy and Ruttledge concurring, the court said that a default denaturalization judgment could not be rendered by a District Court without receiving evidence and that such a judgment was void and could be set aside.

The original judgment, set forth in the opinion, read as follows:

> ". . . The judgments accordingly are reversed and the cause remanded to the District Court with instructions to set aside the judgment by default and grant the petitioner a hearing on the merits raised by the denaturalization complaint."

Justices Reed, Jackson and Chief Justice Vinson dissented, and Justice Frankfurter wrote a separate dissent. The Government moved that the judgment be modified, a fact which apparently has escaped the attention of the petitioner; the court modified the judgment; the modified judgment read as follows:

> "The judgment of the Court of Appeals is reversed and the cause is remanded to the District Court with directions to receive evidence on the truth or falsity of the allegations contained in petitioner's petition to vacate the default judgment entered in the denaturalization proceedings."

This court in the modified judgment did not hold that the default judgment was inherently bad because it was not supported by evidence. Instead it sent the case back,

not to obtain evidence to support the judgment, but instead to determine whether or not the facts alleged in the petitioner's petition were true, that is, whether or not the court would be justified in setting aside the default judgment under provisions of F. R. C. P. 60(b). (App. pp. 1, 2.)

In other words, this court abandoned a first judgment in which the lower court was directed to set aside a default judgment and to receive evidence to determine whether or not judgment should be given upon the merits, and adopted a second judgment in which the lower court was simply directed to determine whether or not the facts alleged in the petition justified setting aside the default, a step provided under F. R. C. P. 60(b) as was clearly pointed out by Justice Frankfurter.

Professor Moore in Moore's Federal Practice, 2d Edition, at Volume 6, page 1818, discusses the *Klapprott* case and points out that while F. R. C. P. 55(b)(2) requires a hearing on evidence for the entry of a default judgment against an infant, or an incompetent defendant not represented by a fiduciary, and that Rule 55(d) requires a similar hearing on a claim against the United States or an office or agency thereof, no such requirement is present in denaturalization cases. He says:

> "No such exceptional treatment is made by the Rule for denaturalization proceedings. The majority of the Court, however, in its original opinion in Klapprott vs. United States subscribed to the view that a default denaturalization judgment, rendered by a district court without hearing any evidence, was void and could be set aside under Rule 60(b)(4) on motion made more than four years later. The court did not, however, adhere to this position, but modified its judgment and remanded the cause to

the district court with directions to receive evidence on the truth or falsity of the defendant's motion to vacate for the purpose of determining whether relief should be granted under Rule 60(b)(6). On remand and after a hearing the district court found that the material allegations of the defendant's motion to vacate the default judgment were false; that defendant 'knowingly, voluntarily, and intentionally permitted the entry of default judgment'; and that defendant has not shown good cause or reason to have the default judgment vacated. And this order was affirmed on appeal.

"In brief, then, where the district court has jurisdiction it may enter a valid denaturalization default judgment without requiring the United States to prove the allegations of the complaint, unless, of course, a hearing must be had under 55(b)(2) because of the defendant's infancy of incompetency."

That the lower court did not misunderstand the directions of the Supreme Court was evidenced by the denial of a subsequent petition for the writ of certiorari to the Court of Appeals for the Third Circuit, see in this connection *August J. Klapprott, petitioner v. United States of America,* 340 U. S. 896, 71 S. Ct. 238, certiorari denied December 4, 1950.

In conclusion with respect to the petitioner's position that the default judgment cannot declare a patent invalid and cannot direct the cancellation of the trademark registration in the absence of evidence to support the well pleaded averments of the complaint which, if taken as true, clearly establish such invalidity, the petitioner's case is patently unsound. His principal decision, the *Klapprott* case, in its law does not support him. If it did, de-

naturalization and patent infringement cases are so dissimilar that a public policy justifying the protection of a claim to citizenship could not be imputed to the protection of the validity of a patent.

POINT 2.

The District Court Has the Power to Direct the Commissioner of Patents to Cancel the Registration of a Trademark.

The judgment of the District Court [R. 99-100] so far as the trademark "Jiffy" was concerned, was to the effect:

> (a) ". . . as between the parties to this action the cross-complainant Jiffy Products Co., Inc., is the owner of the trademark 'Jiffy' . . .."; and
>
> (b) "That under the provisions of 15 U. S. C. 1119 the Commissioner of Patents is ordered to cancel trademark registration 528,028 . . ." and was further directed "so far as any adverse rights of the party Laurence Massa are concerned" to "award a registration of that mark to complainant Jiffy Products Co., Inc., upon the compliance of Jiffy Products Co., Inc., with the requirements of the Patent Office with respect to the granting of a trademark registration and upon the filing of a certified copy of this judgment with the Commissioner of Patents."

It appears that petitioner is of the opinion, as evidenced by his question 2 (Pet. Br. p. 2) that the above judgment awarded the trademark registration to this respondent in the absence of an application by it for registration in the Patent Office. Such clearly is not the case. The so-called award was clearly limited by the provision "so far as any rights of the party Laurence Massa are concerned,"

and by the condition "upon the compliance of Jiffy Products Co., Inc. with the requirements of the Patent Office." If the requirements of the Patent Office are that an application be filed by one making registration, and they are, the judgment does not direct avoidance of that requirement. It is believed that petitioner's second question is clearly without merit.

Petitioner also contends, as respondent understands, that the judgment is in error in ordering the cancellation of the trademark registration because respondent does not have the mark registered and "never did apply to the Commissioner of Patents to have the trademark registered in its name." (Pet. Br., Question 3, p. 2.)

The petitioner's position in this aspect of the case is based upon the decision of *Drittel v. Friedman* (2nd Cir. 1946), 154 F. 2d 653. That decision, as pointed out by the Court of Appeals [R. 114] is not controlling. The *Drittel* case was decided March 29, 1946. The Trademark Act of 1946, including 15 U. S. C. A. 1119 (App. p. 6), became effective July 5, 1947, that is, one year and four months after the *Drittel* decision.

The Trademark Act of 1946 contains three provisions of interest. In 15 U. S. C. A. 1064 (App. p. 2) it is provided that any person may apply directly to the Commissioner of Patents to effect the cancellation of a trademark. This provision of the law does not require that the moving party in such a cancellation proceeding be either a registrant or an applicant for registration.

Under 15 U. S. C. A. 1066-68 (App. pp. 4, 5) the Commissioner of Patents is empowered to declare interference between an application for trademark registration and another application or an existing registration. The

act at Section 1071 (App. p. 5) gives the right to appeal to the Court of Customs and Patent Appeals to a dissatisfied party to such an interference.

In addition to the aforementioned rights and remedies, the Act of 1946 provides at 15 U. S. C. A. 1119 (App. p. 6) that:

> "In any action involving a registered trademark the court may determine the right to registration, order the cancellation of registration . . ."

It is under this provision of the law that respondent sought the relief granted by the District Court and which was affirmed by the Court of Appeals.

The *Drittel* case relied upon by the petitioner is based upon former Section 102 of 15 U. S. C. A. (App. p. 6.) That section specifically provided:

> "Whenever there are interfering registered trademarks . . ."

Such was not the case in the present suit. Respondent could not have sought relief under that section had it continued in effect for it had no "registered trademark."

In the Ninth Circuit the right of the District Court to order the cancellation of a trademark is recognized. Cancellation was ordered in *Dollcraft Co. et al. v. Nancy Ann Storybook Dolls, Inc.* (D. C. Cal. N. D., 1950), 94 Fed. Supp. 1, 88 U. S. P. Q. 18. In that case the court ordered the cancellation of a trademark registration in the absence of a conflicting registration owned by the plaintiff. The decision was affirmed by the Court of Appeals in the Ninth Circuit on May 31, 1952, the decision being found in 197 F. 2d 293, 94 U. S. P. Q. 290, certiorari denied, 344 U. S. 877, 73 S. Ct. 172.

Stated succinctly, respondent did not seek relief under former Section 102 of 15 U. S. C. A. That section was no longer law. The *Drittel* decision was based upon that law. Respondent sought relief under 15 U. S. C. A. 1119 enacted after the *Drittel* decision. Neither the repealed law nor the inapplicable decision affected respondent's rights.

Petitioner's position with respect to the trademark aspect of the case is unsound.

Conclusions.

The petition for writ of certiorari filed on behalf of Laurence Massa presents no meritorious reasons justifying its grant. The denial of the petition is therefore respectfully urged.

Respectfully submitted,

WILLIAM DOUGLAS SELLERS,
Counsel for Respondent.

APPENDIX.

RULE 55(b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE:

"(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States."

RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE:

"(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated

intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., Sec. 1655, or to set aside a judgment for fraud upon the court. Writs of *coram nobis, coram vobis, audita querela,* and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949."

15 U. S. C. A., Sec. 1064:

"1064. Cancellation of registration

"Any person who believes that he is or will be damaged by the registration of a mark on the principal register established by this chapter, or under the Act of March 3, 1881, or the Act of February 20, 1905, may upon the payment of the prescribed fee, apply to cancel said registration—

(a) within five years from the date of the registration of the mark under this chapter; or

(b) within five years from the date of the publication under section 1062(c) of this title of a mark registered under the Act of March 3, 1881, or the Act of February 20, 1905; or

(c) at any time if the registered mark becomes the common descriptive name of an article or substance on which the patent has expired, or has been abandoned or its registration was obtained fraudulently or contrary to the provisions of section 1054 of this title or of subsections (a), (b), or (c) of section 1052 of this title for a registration under this chapter, or contrary to similar prohibitory provisions of said prior Acts for a registration thereunder, or if the registered mark has been assigned and is being used by, or with the permission of, the assignee so as to misrepresent the source of the goods or services in connection with which the mark is used, or if the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, and has not been published under the provisions of subsection (c) of 1062 of this title; or

(d) at any time in the case of a certification mark on the ground that the registrant (1) does not control, or is not able legitimately to exercise control over, the use of such mark, or (2) engages in the production or marketing of any goods or services to which the mark is applied, or (3) permits the use of such mark for other purposes than as a certification mark, or (4) discriminately refuses to certify or to continue to certify the goods or services of any person who maintains the standards or conditions which such mark certifies.

"PROVIDED, That the Federal Trade Commission may apply to cancel on the grounds specified in subsections (c) and (d) of this section any mark registered on the principal register established by this chapter, and the prescribed fee shall not be required. July 5, 1946, c. 540, Title I, Sec. 14, 60 Stat. 433."

15 U. S. C. A., Secs. 1066, 1067 and 1068:

"Sec. 1066. Interference; declaration by Commissioner

"Whenever application is made for the registration of a mark which so resembles a mark previously registered by another, or for the registration of which another has previously made application, as to be likely when applied to the goods or when used in connection with the services of the applicant to cause confusion or mistake or to deceive purchasers, the Commissioner may declare that an interference exists. No interference shall be declared between an application and the registration of a mark the right to the use of which has become incontestable. July 5, 1946, c. 540, Title I, Sec. 16, 60 Stat. 434."

"Sec. 1067. Interference, opposition, and proceedings for concurrent use registration or for cancellation; notice to parties; determination of rights

"In every case of interference, opposition to registration, application to register as a lawful concurrent user, or application to cancel the registration of a mark, the Commissioner shall give notice to all parties and shall direct the examiner in charge of interferences to determine and decide the respective rights of registration. July 5, 1946, c. 540, Title I, Sec. 17, 60 Stat. 434."

"Sec. 1068. Same; action of Commissioner

"In such proceedings the Commissioner may refuse to register the opposed mark, may cancel or restrict the registration of a registered mark, or may refuse to register any or all of several interfering marks, or may register the mark or marks for the person or persons entitled thereto, as the rights of the parties under this chapter may be established in the proceedings: PROVIDED, That in the case of the registration of any mark based on concurrent use, the Commissioner shall determine and fix the conditions and limitations provided for in subsection (d) of section 1052 of this title. July 5, 1946, c. 540, Title I. Sec. 18, 60 Stat. 435."

15 U. S. C. A., Sec. 1071:

Sec. 1071. Appeal to courts; review; election of remedies; Commissioner as party

"Any applicant for registration of a mark, party to an interference proceeding, party to an opposition proceeding, party to an application to register as a lawful concurrent user, party to a cancellation proceeding, or any registrant who has filed an affidavit as provided in section 1058 of this title, who is dissatisfied with the decision of the Commissioner may appeal to the United States Court of Customs and Patent Appeals or may proceed under section 63 of Title 35, as in the case of applicants for patents, under the same conditions, rules, and procedure as are prescribed in the case of patent appeals or proceedings so far as they are applicable: PROVIDED, That any party who is satisfied with the decision of the Commissioner shall, upon the filing of an appeal to the Court of Customs and Patent Appeals by any dissatisfied party, have the right to elect to have all further proceedings under section 63 of Title

35, by election as provided in section 59(a) of Title 35. The Commissioner of Patents shall not be a necessary party to an *inter partes* proceeding under section 63 of Title 35, but he shall be notified of the filing of the bill by the clerk of the court in which it is filed and the Commissioner shall have the right to intervene in the action. July 5, 1946, c. 540, Title I, Sec. 21, 60 Stat. 435."

15 U. S. C. A., Sec. 1119:

"Sec. 1119. Same; power of court over registrations

"In any action involving a registered mark the court may determine the right to registration, order the cancellation of registrations, in whole or in part, restore canceled registrations, and otherwise rectify the register with respect to the registrations of any party to the action. Decrees and orders shall be certified by the court to the Commissioner, who shall make appropriate entry upon the records of the Patent Office, and shall be controlled thereby. July 5, 1946, c. 540, Title VI, Sec. 37, 60 Stat. 440."

Former Section 102 of 15 U. S. C. A.:

"Sec. 102. Suits involving interfering registered trade-marks

"Whenever there are interfering registered trade-marks, any person interested in any one of them may have relief against the interfering registrant, and all persons interested under him, by suit in equity against the said registrant; and the court, on notice to adverse parties and other due proceedings had according to the course of equity, may adjudge and declare either of the registrations void in whole or in part according to the interest of the parties in the trade-mark, and may order the certificate of registration to be delivered up to the Commissioner of Patents for cancellation. Feb. 20, 1905, c. 592, Sec. 22, 33 Stat. 729."